

**REDACTED – FOR PUBLIC INSPECTION**

March 11, 2015

**VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: *Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57***  
**REDACTED – FOR PUBLIC INSPECTION**

Dear Ms. Dortch:

Comcast Corporation hereby submits a redacted, public version of the enclosed *ex parte* letter. The {{ }} symbols denote where Highly Confidential Information has been redacted. The Highly Confidential version of the letter has been submitted to the Office of the Secretary, and will be made available for inspection pursuant to the Second Amended Modified Joint Protective Order in this proceeding.<sup>1</sup>

Please contact the undersigned should you have any questions regarding this matter.

Respectfully submitted,

/s/ Francis M. Buono

Francis M. Buono

*Counsel for Comcast Corporation*

Enclosure

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<sup>1</sup> *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Second Amended Modified Joint Protective Order, 29 FCC Rcd. 13799 (2014) (“Second Amended Modified Joint Protective Order”).

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**VIA HAND DELIVERY**

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**Re: *Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57***

Dear Ms. Dortch:

On March 2, 2015, the Stop Mega Comcast Coalition (“SMC”) submitted in the above docket a self-denominated “white paper” claiming, among other things, that the Commission’s latest net neutrality rules do not mitigate the anticompetitive effects of the proposed transaction and that the transaction should be rejected.<sup>1</sup> It should not go unnoticed by the Commission that the fundamental premise of SMC’s filing is the insulting position that the Commission will not – or will not be able to – enforce its own rules. Besides that questionable contribution to the public debate, SMC’s “white paper” is nothing more than a recycled version of its members’ “greatest hits.” Those tired arguments – allegations not only about Comcast’s alleged incentive and ability to harm OVDs, but also about entirely unrelated video programming and equipment issues – grow no stronger just because they are repeated, particularly by an organization made up of the very same commenters who made the arguments in the first place.

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<sup>1</sup> See Letter from Stop Mega Comcast Coalition to Marlene H. Dortch, FCC, MB Docket No. 14-57, Attach. at 1-2 (Mar. 2, 2015) (SMC white paper, “Net Neutrality Rules Are No Cure for Mega-Comcast”) (“*SMC White Paper*”).

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To the contrary, those arguments in their current form have proved themselves even weaker and less coherent, since they are now advanced with even less attention to fact or logic than in their initial questionable formulation. This is perhaps most starkly apparent in SMC's feverish list of 53 presumed bad acts (the "53 Harms"<sup>2</sup>), which groups together a grab bag of often self-contradictory and simply incoherent theories of harm from the transaction. SMC's own language betrays the flaws in its reasoning: SMC asserts that, with endless choice of "tactic and of technique," Comcast could "elude scrutiny, eschew blame, or engineer around the regulation entirely."<sup>3</sup> But alliterative language, however pleasing on the page, is no substitute for logic. And the unadorned truth is that the latest SMC filing contributes nothing sound or solid to the record in this proceeding.

It is quite telling, as well, that SMC resorts to featuring warmed-over claims about long-resolved pre-transaction disputes. Leaving aside that their portrayal of the issues is simply wrong, what its inclusion of these old (and discredited) aspersions show more than anything else is that SMC has found nothing new – or credible – to say. In short, this "white paper" is simply a compilation of invective, unsupported and unsupportable economic and legal theories, and a hodgepodge of self-contradictory predictions. Applicants have already refuted each and every one of SMC's core claims, and beyond that have more than demonstrated the enormous benefits this transaction will bring to customers in the acquired markets – a central element of the Commission's public interest analysis that SMC simply ignores.

This letter briefly addresses some of the central flaws in SMC's filing: (1) net neutrality-related argumentation; (2) specious claims about OVDs; (3) other unrelated harms that SMC conjures; and (4) the 53 Harms list. However, the most appropriate response is for the Commission to disregard SMC's filing and to return the focus to the extensive record evidence composed of hard data and sound arguments that overwhelmingly supports approval of the transaction.

### **I. There Is No Basis To Conclude That the Commission Will Be Unable To Enforce Its Open Internet Rules.**

SMC suggests that the transaction must be denied because it will somehow create a greater opportunity for Comcast to "defy any net neutrality constraints," by "avoiding, evading, or working around" them.<sup>4</sup> The flaw with this argument (leaving aside its rather dour evaluation

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<sup>2</sup> *Id.* at 5-8. In another perhaps unintended paradox, SMC cautions that the 53 Harms are only the "known ways" in which Comcast "could harm" OVDs, and then suggests "there are likely many others." *Id.* at 3 (emphasis added). Thus, even the numerical precision of the 53 Harms is called into doubt by the potential for further exercise of SMC's imaginative powers.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 1.

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of the Commission’s oversight abilities) is that there are no real facts or economic theory to underpin it. For example, the sole basis SMC offers for its suggestion that the transaction creates a significant risk of net neutrality violations is the wholly unsupported statement that “the merger would create a hugely increased incentive to defy any net neutrality constraints.”<sup>5</sup> But why this would be so is never explained.

Of course, the most obvious response to this entire chain of reasoning is that Comcast is uniquely bound by the 2010 Open Internet rules, and will bring that commitment to the acquired markets – and will be bound like everyone else by the Commission’s new rules when they are put in place. But SMC simply dismisses that, insisting that “net neutrality restraints have proven ineffective” to date – a statement it bases entirely on its inaccurate portrayal of the Comcast-Netflix commercial dispute. It should hardly bear noting that SMC’s characterization of the dispute as Comcast’s “throttling” of Netflix traffic is just wrong: Netflix *itself* publicly dismissed that characterization.<sup>6</sup> Indeed, in the extensive filings from the parties actually involved in the relevant dispute – Netflix, Cogent, and Comcast – there is no credible accusation of “throttling”; the parties address the dispute as the backbone/transit/peering issue that it was.<sup>7</sup> Netflix, too, has stressed that direct peering issues are not net neutrality issues.<sup>8</sup> In other words, SMC’s supposed “smoking gun” here is nothing but an utter – and recognized – fiction.

The bottom line is that seven of the first ten of the 53 Harms are expressly prohibited by the 2010 Open Internet rules *and* by the Commission’s new rules (Nos. 1-5, 7, and 9),<sup>9</sup> and two reportedly will be subject to Commission oversight under its new rules (Nos. 8 and 10).<sup>10</sup> And the remaining hypothetical (No. 6) is so trumped up that it is hard to understand, much less

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<sup>5</sup> *Id.*

<sup>6</sup> Netflix CEO Reed Hastings and CFO David Wells admitted to an analyst that “they don’t think cable and telco companies are hampering [Netflix’s] video streams.” See Peter Kafka, *Netflix Says Verizon Isn’t Slowing Down Its Streams*, Re/code, Feb. 11, 2014, <http://recode.net/2014/02/11/netflix-says-verizon-isnt-slowing-down-its-streams/>. Based on this discussion, the analyst reported that: “Netflix does not seem overly concerned regarding Net Neutrality, and continues to believe that violations would be escalated quickly. Netflix also indicated that *it has no evidence or belief that its service is being throttled.*” *Id.* (emphasis added).

<sup>7</sup> See Netflix Reply Comments at 14-19; Cogent Reply Comments at 4-8; Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57, at 208-11 (Sept. 23, 2014) (“Opposition and Response”); see also *id.*, Exhibit 4, Declaration of Kevin McElearney ¶¶ 31-42.

<sup>8</sup> See Netflix Petition at 61-62.

<sup>9</sup> Comcast is prohibited from blocking, slowing down, and degrading the quality of OVD content; increasing specialized services lanes to curtail the speed of the public Internet; creating fast lanes for Comcast-TWC services and slow lanes for OVD content; and restricting the ability of OVD applications/services to work on the Comcast-TWC network.

<sup>10</sup> As discussed in more detail below, the Commission will entertain complaints about interconnection practices.

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credit.<sup>11</sup> Surely, SMC cannot seriously be suggesting that the Commission is incapable of enforcing its rules – now or post-transaction. The Commission does not need Comcast to defend the agency’s oversight and enforcement capabilities.<sup>12</sup> And in all events, under the new rules, Netflix and other OVDs reportedly will have the ability to bring complaints concerning the type of interconnection disputes about which SMC is so concerned – and consumers reportedly will also be able to police net neutrality violations with complaints of their own.<sup>13</sup> Thus, even if SMC apparently lacks faith in the Commission itself, it should be reassured that the potential “victims” of the open Internet harms SMC theorizes will have recourse to seek redress in the highly unlikely event any of them occurs.

Nor is there merit to SMC’s concern that the “fate of the net neutrality rules is uncertain” because “the rules may be affirmed or changed, or the FCC’s interpretation of them may end up leaving important aspects of [Comcast’s] market power entirely unconstrained.”<sup>14</sup> Although SMC claims that “[s]uch speculative protections are too thin a reed on which to approve this transaction,” the much more sound conclusion is that such speculative *projections* – especially those based on wholly unsubstantiated claims of “market power” – are too thin a reed on which to *deny* this transaction.<sup>15</sup> And that is all the more true given that Comcast remains bound by its commitment to abide by the prior rules.

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<sup>11</sup> Contrary to SMC’s claim, Comcast has no means to artificially route OVD content through middle-mile facilities because it does not route OVD content in the first place; OVDs and their intermediaries are the sole entities controlling the routing of OVD content through middle-mile facilities. To the extent SMC is suggesting that Comcast would receive OVD content from the middle-mile providers that the OVD has selected and then, rather than route the content directly to Comcast customers, Comcast would route it back over middle-mile facilities to itself, that hypothesis is in the realm of pure imagination.

<sup>12</sup> This is a fact of which Dish (founder and funder of SMC) should be well aware given the Commission’s review of Dish’s \$3 billion incentive auction discount and calls from Commissioners and others to further investigate Dish’s auction practices. *See* Alina Selyukh, *Dish’s \$3 Billion Wireless Auction Discount Up for U.S. Regulator Review*, *Reuters*, Jan. 30, 2015, <http://www.reuters.com/article/2015/01/31/us-usa-spectrum-dish-network-idUSKBN0L402G20150131>; *see also* Howard Buskirk & Merlena Chertock, *Dish’s Bidding Strategy in AWS-3 Auction Said To Raise Big Questions for FCC*, *Communications Daily*, Mar. 6, 2015; Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program (Feb. 2, 2015) (noting that Dish’s “participation makes a mockery of the [Designated Entity] program” and calling for an investigation of Dish’s discounts).

<sup>13</sup> *See* Press Release, *FCC Adopts Strong, Sustainable Rules To Protect The Open Internet*, at 3-4 (Feb. 26, 2015).

<sup>14</sup> *SMC White Paper* at 1, 5.

<sup>15</sup> Given that many of SMC’s members openly advocated that Title II reclassification of broadband Internet access service was the only legally sound basis for the Commission to adopt its new Open Internet rules and was eminently defensible, it is inconsistent for SMC now to point to the potential for reversal as a reason for why the net neutrality rules will not protect consumers. *See, e.g.*, Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, GN Docket No. 14-28, at 1 (July 15, 2014) (“Rules grounded in Title II would give the Commission the authority it needs to implement rules that truly protect a single, open internet.”); Comments of

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### II. SMC’s Allegations About Comcast’s Incentive and Ability To Harm OVDs Are Contrary to Marketplace Facts and Nothing but Baseless Speculation.

SMC’s notion that Comcast would willfully defy net neutrality rules is based on SMC’s groundless allegation that the transaction will “amplify dramatically Comcast’s incentive and ability to do harm to” OVDs.<sup>16</sup> These speculative claims are inconsistent with the record evidence in this proceeding.

As an initial matter, the flaws in SMC’s arguments are exemplified by and premised upon its mischaracterization of this as a horizontal transaction between two competing outlets for OVDs.<sup>17</sup> But these claims are inconsistent with the *Horizontal Merger Guidelines* and the extensive facts in the record on this matter. As Dr. Israel explained:

[E]vidence that merging parties act as competitive constraints on one another is generally at the heart of merger analysis. Such evidence of competitive constraints is *entirely absent* from commenters’ analysis of the transaction. In particular, commenters have not advanced *any* direct evidence of a competitive constraint imposed by one of the merging parties on the other, or *any* indirect evidence of substitution between the merging parties on any dimension (either acting as sellers or buyers). As such, there is no evidence for the standard horizontal theories of harm, in which constraints imposed by one merging party prevent the other from profitably taking an action unilaterally, or taking an action in coordination with other competitors, with this constraint relaxed due to the transaction.<sup>18</sup>

Indeed, the absence of any such evidence of competitive constraints explains why SMC fails – much less attempts – to link its claims in any credible way to the transaction itself. As Dr. Israel concluded, there is no transaction-specific evidence “that the incremental number of customers that Comcast would gain from the transaction . . . would make the difference between

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Open Technology Institute at the New America Foundation and Benton Foundation, GN Docket No. 14-28, at vi (July 17, 2014) (“Title II would allow the Commission to protect against the full scope of harms, and the Commission could implement a bright-line rule that creates a presumption against discrimination as well as either banning access fees outright or requiring that such fees be applied in a manner that is consistent for all parties.”); Comments of Consumers Union, GN Docket No. 14-28, at 10 (July 15, 2014) (“Reclassification will provide certainty, protect against practices that harm consumers and competition, and help ensure that consumers are able to reap the benefits of an affordable and accessible Internet.”).

<sup>16</sup> SMC White Paper at 1-2.

<sup>17</sup> See *id.* at 2 (“Comcast and TWC represent two separate broadband access options to which OVDs can turn in their effort to achieve near-nationwide critical mass. With the merger, the two options would become one.”).

<sup>18</sup> Israel Reply Decl. ¶¶ 36-37 (internal citations omitted) (emphasis added).

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Comcast having or not having the [incentive or] ability to foreclose” OVDs.<sup>19</sup> It is likewise unsurprising that SMC points to no credible evidence that Comcast currently has the incentive or the ability to harm OVDs, because no such incentive exists in the first place, given that OVDs are highly complementary to Comcast’s and TWC’s broadband services, thus enhancing the value and the return from their broadband networks.<sup>20</sup> Nor has SMC demonstrated that the proposed transaction would *change* either Comcast’s incentive or its ability to harm OVDs.<sup>21</sup>

All these allegations willfully ignore the thriving OVD landscape in which new OVDs are announced regularly and existing OVDs such as Netflix have grown and prospered. Far from hindering the development of OVDs, Comcast has worked cooperatively with OVDs to provide their joint customers with high-quality video content delivered by broadband.<sup>22</sup> Notably, even an internal company document seized on by opponents – including SMC’s moving force, Dish – as evidence of Comcast’s alleged incentive to harm OVDs in fact demonstrates that all of Comcast’s responses to disruptive developments that some OVD models may introduce are distinctly *pro-competitive*.<sup>23</sup> These include: {{

}}.<sup>24</sup> And that is what opponents like Dish consider to be their *best* evidence in support of their unsubstantiated theories.

### III. SMC’s Attempts To Tack On Other Harms Beyond Those to Just OVDs Bring It No Closer to a Credible Theory.

Moving beyond these theoretical harms to OVDs, SMC attempts to conjure a variety of harms in other unrelated areas, likely in an attempt to satisfy the parochial interests of each of its

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<sup>19</sup> *Id.* ¶¶ 115, 139

<sup>20</sup> *Id.* ¶¶ 11, 122-125.

<sup>21</sup> *Id.* § IV. For example, Dr. Israel demonstrated that “the pool of non-Comcast/TWC broadband customers in the marketplace provides more than sufficient scale for an OVD to succeed even if (counterfactually) that OVD had no access to the combined firm’s customers,” thus undermining SMC’s inconsistent claim that OVDs require near-nationwide critical mass. *See id.* ¶ 108. Furthermore, if near-nationwide critical mass is required for OVDs to succeed, as SMC claims, then both Comcast and TWC would have the ability individually and independently to foreclose OVDs today; the transaction would not enhance any such ability.

<sup>22</sup> *See, e.g.*, Opposition and Response at 200-07.

<sup>23</sup> *See* Comcast RFI Exhibit 101.1 at 17 ({{  
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<sup>24</sup> *Id.*

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members. Here, too, SMC merely recycles and repackages the same unsubstantiated allegations that are already rife – and already discredited – in the proceeding:

***No Harm to Video Programming Market.*** SMC contends that Comcast's increased scale post-transaction will somehow harm programmers, and that Comcast will deny its competitors access to NBCUniversal programming and foreclose unaffiliated programmers. All of SMC's claims regarding the video programming market are unfounded. As for the by now well-worn monopsony claims, SMC conveniently ignores the fact that Comcast's share of managed residential subscribers will be below the prior 30 percent cap under the Commission's twice-rejected horizontal ownership rules,<sup>25</sup> and approximately the share approved by the Commission in the *AT&T Broadband* and *Adelphia* transactions. Moreover, in today's fiercely competitive video distribution marketplace, it is content providers that enjoy significant bargaining leverage, not distributors.

Nor will the transaction increase Comcast's incentive or ability to withhold NBCUniversal programming from other MVPDs or OVDs. This transaction simply is not about programming, as most have by now conceded. It involves a small amount of additional video programming, and a withholding strategy for the content that NBCUniversal has been robustly licensing to MVPDs and OVDs for the past four years is simply not plausible: it would make no economic sense, as it would only harm NBCUniversal.<sup>26</sup>

As for program *carriage* concerns, those are even less relevant to this proceeding. And Comcast has a stellar record of support for independent programmers: it carries over 160 independent networks; six out of every seven networks carried are unaffiliated with the company; and Comcast has added 20 independent networks and substantially expanded carriage of 141 independent networks by over 217 million customers, collectively.<sup>27</sup>

***No Harm to Latino Market.*** SMC's allegation that the transaction would in some way diminish programming choices for Latino customers or limit opportunities for Latino-oriented networks is also at odds with the facts,<sup>28</sup> and at odds with the substantial support in the record from members of the Hispanic/Latino community, making SMC a curious objector on this

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<sup>25</sup> See *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009); *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

<sup>26</sup> See, e.g., Opposition and Response at 239-49.

<sup>27</sup> *Id.* at 249-62.

<sup>28</sup> *SMC White Paper* at 5. SMC also inaccurately states that Comcast would pass more than 90 percent of Latino households. Applicants have already shown that this figure is both overstated and irrelevant. See Opposition and Response at 160 n.499.

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issue.<sup>29</sup> Comcast offers numerous programming options geared to the Latino community and will bring this same commitment to diverse programming choices to the acquired systems. Not only does Comcast carry dozens of such networks, but it has also expanded the carriage of seven Hispanic programming services (by more than 14 million customers) since 2011.<sup>30</sup>

***No Harm to Advertising Market.*** SMC's contention that the transaction will somehow limit local advertising options for advertisers (citing Comcast's "control" of 71% of local cable advertising) is ironic, given that the only actual advertisers who appeared in this proceeding support the deal unequivocally. The only parties who raise advertising issues are Comcast's advertising competitors – which is why it is hardly surprising that SMC, standing in for Dish, recycles this particular argument.<sup>31</sup> The fact is, this transaction will have no impact on local cable advertising competition or advertising options because the companies do not currently compete for local advertisers. Beyond this, advertisers have a wide array of additional local advertising options (including the multiple television and non-television options). Spot cable advertising accounts for only about seven percent of the \$72 billion annual spending on local advertising, a share that is irrelevant under any antitrust standard.<sup>32</sup>

As for FreeWheel, which is not even focused on the local cable advertising market, the simple answer is that has nothing to do with this transaction at all; SMC's effort to make this online ad insertion company relevant to the TWC-Comcast cable transaction is both challenged and essentially incoherent. The bottom line is that advertising is relevant to this deal in only one way: the transaction will help accelerate the development and further deployment of next-generation advertising technologies, to the *benefit* of programmers and advertisers.<sup>33</sup>

***No Harm to Equipment Marketplace.*** The absurdity of SMC's claims is particularly exemplified by its contention that the transaction would result in Comcast's X1 becoming the default streaming platform, somehow displacing the myriad of interconnected device options for consumers that exist today.<sup>34</sup> SMC conveniently ignores the fact that Netflix, Hulu, YouTube, Amazon, and many other OTT video providers have been able to reach millions of customers through game consoles, Blu-ray players, Smart TVs, and millions of other devices, none of which use a Comcast platform. It is unclear how this reality changes simply because the new, customer-friendly Comcast platform will extend to additional customers.

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<sup>29</sup> See, e.g., Opposition and Response at 8-12 (citing support from Hispanic business and community organizations, as well as programmers).

<sup>30</sup> *Id.* at 262-65.

<sup>31</sup> See *SMC White Paper* at 5.

<sup>32</sup> Opposition and Response at 271-82.

<sup>33</sup> *Id.* at 75-80.

<sup>34</sup> See *SMC White Paper* at 4-5.

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Recognizing the insufficiency of this claim in its “white paper,” in a more recent filing, SMC seizes upon a new ripped-from-the-headlines claim: that Comcast’s commercial decisions about when and whether to authenticate every application on each and every new popular device – in this case, HBO Go on Sony’s PlayStation 4 – will lead to the X1 becoming the default streaming platform for OVDs and the foreclosure of other interconnected devices.<sup>35</sup>

As an initial matter, it bears noting that last year, this same hysterical pitch was reached over Comcast’s alleged “failure” to authenticate HBO Go on Roku. Since Comcast and Roku have since reached an authentication arrangement,<sup>36</sup> the furor has moved on to another device. But all this emphasizes is the non-transaction-specific nature of SMC’s claim. It also illustrates the degree to which authentication issues – which are purely commercial *and voluntary* arrangements negotiated by programmers, device makers, and cable providers – are part of an evolving marketplace. There is no freestanding obligation for Comcast to immediately authenticate any programmer app on a device that happens to be in the news at that particular moment – though Comcast does in fact provide authentication services for more than 90 network apps on up to 18 different devices, and that list is only growing.<sup>37</sup>

Comcast also is focused on serving its customers through a more unified, secure, and consistent authentication platform – its comprehensive Xfinity Go application – which provides Comcast subscribers with online access to a host of programmers through *one* app on a range of iOS and Android devices, as well as PCs. Other MVPDs, in contrast, may rely on programmer app authentication to serve their customers’ online programming needs. That is a competitive differentiator for different MVPDs in a robustly competitive market – but it is *not* anticompetitive by a long shot: a business decision not to authenticate a particular app on a particular device in one instance is hardly evidence of harm to third-party device manufacturers, who, as in the case of PlayStation, enjoy immense success with or without Comcast authentication.<sup>38</sup> In fact, ironically, one way such device makers are asserting themselves is by

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<sup>35</sup> See Letter from SMC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Mar. 6, 2015).

<sup>36</sup> See Letter from Jonathan Kanter, Cadwalader, Wickersham & Taft LLP, Counsel for Roku, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Dec. 15, 2014) (noting Comcast-Roku authentication agreement).

<sup>37</sup> See Matt Strauss, *HBO GO & Showtime Anytime on Roku Players and Roku TV: Now Available for Xfinity TV Customers*, Comcast Voices (Dec. 16, 2014), <http://corporate.comcast.com/comcast-voices/hbo-go-showtime-anytime-on-roku-players-and-roku-tv-now-available-for-xfinity-tv-customers>.

<sup>38</sup> Nor does this decision harm HBO, which Comcast authenticates on a variety of devices: desktop/laptop computers, iPads, iPhones, Android smartphones, Kindle Fire, Android tablets, Samsung Smart TVs, Xbox 360, Apple TV, and Roku. See Response to RFI 43(f).

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providing *exclusive content* that can *only* be “authenticated” on their device, by their device customers.<sup>39</sup>

Further, SMC’s notion that the X1 would displace these immensely popular third-party devices severely strains logic. Today, X1 does not include authenticated TV Everywhere video apps,<sup>40</sup> so it is hard to see how it could replace other devices that provide access to such OTT video apps as well as others. In no way does an X1-enabled box impede a customer’s ability to use a PlayStation 4 or another device in conjunction with the set-top box.

#### IV. SMC’s List of 53 Harms Is Utterly Without Merit.

With no coherent arguments, SMC finally resorts to presenting a parade of hypothetical horrors consisting of 53 Harms that could result from the deal – a list that is both internally inconsistent and overwhelmingly speculative. Stringing together a collection of hypotheticals is neither evidence nor even theory, and should be dismissed out of hand. In assessing SMC’s compilation of conjecture, the Commission may refer to the comprehensive chart prepared by Applicants, which responds to each and every one of SMC’s major claims and cites actual record evidence – including extensive expert economic testimony and documents and data – refuting them.<sup>41</sup> Thus, it is not necessary to belabor the list of 53 Harms in order to rebut it fully. In brief:

***The 53 Harms List is Self-Contradictory.*** Perhaps the clearest demonstration that the listed harms are incoherent is that many contradict each other (to the extent that they are even understandable). For example, No. 26 assumes that Comcast will somehow be able to “require” the distribution of OVD programming through its “MVPD service at below-market rates.” Although (like so much else in SMC’s filing) it is unclear what exactly this means, to the extent it assumes that Comcast would not only seek but require the distribution of OVD content in connection with its cable platform, it is undercut by SMC’s claims that Comcast seeks to *prevent*

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<sup>39</sup> One business day after SMC decried Comcast’s failure to authenticate HBO Go on the PS4, Apple announced an exclusive deal with HBO: only Apple device users will be able to enjoy HBO’s new app, HBO Now. See Keach Hagey, *Apple Signs On as HBO Video-Streaming Partner*, Mar. 9, 2015, Wall St. J., <http://www.wsj.com/articles/apple-signs-on-as-hbo-video-streaming-partner-1425922629>. It is hard to fathom how it is acceptable for HBO to sell device-restricted access to its programming, while SMC Comcast’s approach, which provides its customers with robust anywhere access to HBO and dozens of other programmers on not only Comcast-supplied but any third party set-top box as well as on a broad variety of third party online devices.

<sup>40</sup> Indeed, doing so would be superfluous since Comcast only authenticates the apps of programmers whose programming it carries as an MVPD, and a customer using an X1-capable set-top box already receives all of the Comcast cable service programming to which she or he subscribes on that box. See Opposition and Response at 189-90.

<sup>41</sup> See Comcast Corporation and Time Warner Cable Inc., Reply to Responses, MB Docket No. 14-57, Exhibit A (Dec. 23, 2014).

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OVDs from succeeding because they threaten Comcast's cable service. As to the "below-market rates" that Comcast will presumably extract from OVDs,<sup>42</sup> it is notable that only two harms up the list, at No. 24, SMC has Comcast demanding "unreasonably high rates" for OVDs to work on Comcast set-top boxes. If this is not enough of a jumble, SMC has Comcast, at No. 25, favoring NBCUniversal content on the same set-top boxes "to the detriment of competing" content. It is hard to keep even this completely made-up story straight.

Similar contradictions and incoherency abound. Comcast will on the one hand force edge providers into direct connections (No. 15), while on the other hand charge CDNs too much (No. 14). One wonders why CDNs would be willing to pay unreasonable rates if they no longer have significant edge provider traffic to deliver (since Comcast will supposedly have supplanted their business with forced direct connections). Using similar "logic," SMC asserts that Comcast will on the one hand insist on licensing too much content to OVDs (No. 34) while on the other hand refuse to license or limit content to OVDs (No. 43). And so on.

***The 53 Harms List Has No Foundation in Reality.*** Even in the instances where SMC's hypothesized harms do not flat out contradict each other, they are not fact-based or simply assume outcomes without explaining why or how they would be so.

As noted above, seven of the top ten harms SMC trumpets would be per se illegal under the Commission's pre-existing or new net neutrality rules, and the others would (at a minimum) be subject to Commission oversight. (No. 49 also fits into this category.) Asserting that these harms are likely to happen is the equivalent of saying: assume Comcast will break the law and not get caught. That is not argument; it is invective. Putting aside whether it is legitimate to postulate that any company will simply break the law, there certainly is no reason why a larger company – one with presumably even more to lose – would be more likely to break the law than a smaller one. The fact that Comcast has an unblemished record of compliance with the Open Internet rules and its NBCUniversal obligations to abide by them only underscores the degree to which this list is more rhetoric than fact.

Beyond such malicious speculation, the 53 Harms list is shot-through with the false assumption that Comcast will have the power simply to bend other players to its will. In other words, it assumes zero bargaining power on the part of OVDs, MVPDs, CDNs, programmers, equipment manufacturers, etc. Each of these multi-billion dollar players would be subject to Comcast's unchecked ability to "require," "restrict," "refuse," and "impose," be it in interconnection arrangements (Nos. 11-17), program buying (Nos. 31-14), program licensing (Nos. 35-38), or supply agreements (Nos. 39-40). To put this in perspective, it is hard to believe

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<sup>42</sup> It is possible that SMC also means that Comcast will require OVDs to sell their content to consumers at below-market rates, which makes no sense on its own terms, but also does not comport with the theory that Comcast would do everything in its power to make OVD content less attractive to consumers.

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that a total of seven million more customers would somehow make Comcast unilaterally able to impose its will on every single relationship and player in the marketplace, which is seemingly what SMC posits. The reality today – with only seven million fewer customers – is certainly to the contrary, since Comcast negotiates with all of these players all of the time to reach mutually beneficial business arrangements. That is not simply because Comcast is a good actor, but also because (1) these players are complementary to Comcast’s services (i.e., Comcast needs them), and (2) these players bring to bear their own business interests and leverage in negotiating mutually favorable outcomes. SMC does not even begin to substantiate (because it cannot) how the transaction will change any of that.<sup>43</sup>

SMC is also not beyond the same frantic hand-waving on issues that, for good reasons, have not been a serious part of this proceeding, because they lack substance and relevance. Chief among these are the FreeWheel alleged harms (Nos. 50-53). The reality is that FreeWheel is part of one of the most dynamic, fast-changing, and competitive marketplaces – online ad-insertion – with both Google and Facebook as significant players. The SMC theory is not even clear (especially insofar as SMC attempts to tie it to Comcast’s local cable business, which is a space all but unrelated to FreeWheel’s business),<sup>44</sup> but the postulated harm is particularly dubious, both because FreeWheel needs as robust a business as it can have (and has every interest in the highly complementary growth of the online video business), and because programmers and OVDs, who have many choices, do not require FreeWheel to succeed in this space. For similar reasons, whether or not OVDs will be allowed to advertise on NBCUniversal channels – and competing distributors like DirecTV advertise heavily on NBCUniversal channels today – is not remotely a transaction-specific issue, since this transaction involves no acquisition of national programming channels, and is not even a credible competitive issue, since NBCUniversal represents only a small fraction of total national advertising availability.

### **V. SMC Simply Ignores the Substantial Benefits of the Transaction.**

Beyond just resorting to mischaracterizations of fact and speculation about the potential harms from the transaction, SMC’s filing is further flawed in that it wholly ignores the

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<sup>43</sup> Of course, confusingly, SMC at the same time contends that with approximately seven million *fewer* customers, Comcast is *already* engaging in the relevant conduct. SMC cannot have this both ways: either these issues are risks of the transaction – somehow tied to the increase of approximately seven million customers – or they are harms that Comcast could theoretically undertake in the market today. But the latter argument may prove too much – if Comcast has all the power SMC alleges, Comcast is, as Dr. Carlton explained during the Economic Analysis Workshop, doing a “terrible job” at foreclosing OVDs, as the booming state of the OVD industry, and very low interconnection fees, aptly demonstrate. Transcript of Economic Analysis Workshop, Federal Communications Commission, Proposed Comcast-Time Warner Cable-Charter Transaction, January 30, 2015, at 88:5-9.

<sup>44</sup> See *SMC White Paper* at 5.

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substantial public interest benefits of the transaction for residential and business customers.<sup>45</sup> Applicants have demonstrated that the transaction will, among other benefits:<sup>46</sup>

- Accelerate network upgrades and enhancements (driven by increased investment) that will enable the delivery of some of the industry’s fastest speeds – speed increases that alone would result in consumer benefits totaling approximately *\$1.1 billion annually*;<sup>47</sup>
- Support further deployment of a more robust and expansive Wi-Fi network;
- Bring much-needed competition to the business services market, leading to lower prices and improved services for business customers (yielding billions in cost savings over 10 years for enterprise customers alone);<sup>48</sup>
- Lead to greater availability of advanced voice and video services, including X1, cloud DVR, and more video-on-demand and TVE choices;
- Accelerate the deployment of advanced advertising technologies; and
- Improve the resiliency and security of the combined company’s networks.<sup>49</sup>

Applicants have demonstrated that the transaction will serve the public interest, convenience and necessity, based on evidence of merger-specific, verifiable, and non-speculative benefits.<sup>50</sup> SMC’s “white paper” is merely yet another example of transaction opponents’ preference to ignore the public interest benefits of the transaction in favor of repackaging their original speculative theories of harm that have already been refuted. And even if the Commission were to give some weight to these recycled theories, the clear benefits of the

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<sup>45</sup> Opposition and Response at 36-59.

<sup>46</sup> See, e.g., *id.* at 59-112; Applications and Public Interest Statement of Comcast Corporation and Time Warner Cable Inc., MB Docket No. 14-57, at 67-126 (Apr. 8, 2014).

<sup>47</sup> Israel Reply Decl. § VIII; Letter from Michael D. Hurwitz, Willkie Farr & Gallagher LLP, Counsel for Comcast Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57, Exhibit A (Feb. 26, 2015) (attaching “Analysis of Broadband Consumer Benefits Arising from the Transaction” prepared by Dr. Israel).

<sup>48</sup> See Letter from Francis M. Buono, Willkie Farr & Gallagher LLP, Counsel for Comcast Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57, at 1 (Feb. 24, 2015).

<sup>49</sup> See Applications and Public Interest Statement of Comcast Corporation and Time Warner Cable Inc., MB Docket No. 14-57, at 124-46 (Apr. 8, 2014) (“Comcast-TWC Public Interest Statement”); Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Mar. 4, 2015) (*ex parte* meeting to discuss cybersecurity-related benefits of the transaction).

<sup>50</sup> See, e.g., *SBC Commc’ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290 ¶ 16 (2005); *Applications of Ameritech Corp. and SBC Commc’ns Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd. 14712 ¶ 255 (1999).

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transaction “easily swamp any potential competitive harms from the transaction,<sup>51</sup> particularly given that . . . such harms are unsupported by theoretical or economic evidence and are likely to be extremely small, if they occur at all.”<sup>52</sup> As such, the transaction should be approved.

Please direct any questions to the undersigned.

Respectfully submitted,

/s/ Francis M. Buono  
Francis M. Buono  
*Counsel for Comcast Corporation*

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<sup>51</sup> See, e.g., Opposition and Response at 59-112;

<sup>52</sup> Israel Reply Decl. ¶ 222.